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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1942.

No. 628.

THE INTERSTATE COMMERCE COMMISSION, J. M. KURN and JOHN G. LONSDALE, Trustees, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al.,

Appellants,

vs.

COLUMBUS AND GREENVILLE RAILWAY COMPANY,

Appellee.

Appeal from the District Court of the United States for the Northern District of Mississippi, Eastern Division.

BRIEF ON BEHALF OF RAIL APPELLANTS.

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OPINION BELOW.

The report of the Interstate Commerce Commission, hereinafter referred to as the "Commission" (in *Cottonseed Allowances of Columbus & Greenville Railway Co.*, decided January 3, 1942), appears in 248 I. C. C. 441 (R. 5-13). The opinion of the specially constituted District Court, accompanied by its findings of fact and conclusions of law, is found in the record at pages 66 to 71, reported in 46 F. Supp. 204, titled *Columbus & Greenville Ry. Co. v. United States et al.*

JURISDICTION.

The final decree of the District Court was entered on August 17, 1942 (R. 71-72). On November 19, 1942, the District Court extended the date within which said record shall be filed and docketed to January 5, 1943 (omitted in printing). The petition for appeal (R. 73) was filed and allowed on October 14, 1942 (R. 76). Probable jurisdiction was noted by this Court on February 1, 1943 (R. 80).

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, section 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, section 35, 31 Stat. 85; April 30, 1900, c. 339, section 86, 31 Stat. 158; March 3, 1909, c. 269, section 1, 35 Stat. 838; March 3, 1911, c. 231, sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, section 2, 38 Stat. 804; February 13, 1925, c. 229, section 1, 43 Stat. 938).

QUESTIONS PRESENTED.

The Interstate Commerce Commission, in a report issued after an investigation instituted upon its own motion under Section 13 (2) of the Interstate Commerce Act as amended (*Cottonseed Allowances of Columbus & Greenville Railway Co.*, 248 I. C. C. 441, decided January 3, 1942) found that to the extent appellee's tariff I. C. C. No. 81 provided for a refund, or a cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it was unlawful, being in violation of Section 1 (6), Section 6 (4) and Section 6 (7) of the Interstate Commerce Act (R. 5-13).

An order was issued by the Commission on January 3, 1942, requiring appellee to cancel such unlawful provisions of said tariff on or before February 26, 1942 (R. 12). By order of the Commission, dated February 13, 1942, the effective date of its order of January 3, 1942, was modified to become effective April 28, 1942 (R. 13).

A complaint was filed by the Columbus and Greenville and in a decision, dated July 31, 1942, a statutory three-judge court of the Eastern Division of the Northern District of Mississippi held that the Commission's order of January 3, 1942, was invalid (R. 66-71), and on August 17, 1942, that Court entered a final decree for permanent injunction (R. 71-72).

The issue before the Court is as to the validity of the Commission's order of January 3, 1942. The fundamental questions are:

> First. Was appellee accorded proper notice and a full opportunity to be heard?
>
> Second. Was the order of the Interstate Commerce Commission reasonable and lawful?

Subordinate questions are as follows:

1. Whether the Court should substitute its judgment for the judgment of the Commission in declaring that the Columbus and Greenville Railway Company Freight Tariff No. 9-B, I. C. C. No. 81, does not conform to the standards laid down by the Interstate Commerce Act;

2. Whether the order of the Commission is supported by findings sufficient to disclose basic facts on which the Commission acted, and sufficient to disclose a correct application of statutory standards;

3. Whether the order and findings of the Commission are supported by the evidence, and;

4. Whether the Commission acted upon considerations authorized by law.

THE STATUTES INVOLVED.

The provisions of Part I of the Interstate Commerce Act [Title 49, U. S. C., Sec. 1, par. (6); Sec. 2; Sec. 3, par. (1); Sec. 6, par. (1), par. (4) and par. (7); Sec. 13, par. (2), and Sec. 15, par. (13)], which govern the disposition of this case, are reproduced in full in Appendix A hereto. The pertinent provisions thereof may be summarized as follows:

Section 1 (6) of the Act provided that it is the duty of all common carriers to establish, observe, and enforce just and reasonable classifications of property for transportation, and every unjust and unreasonable classification, regulation and practice is prohibited and declared to be unlawful.

Section 2 of the Act prohibits unjust discrimination and declares that rebates and all other devices resulting in unjust discrimination are unlawful.

Section 3 (1) of the Act forbids undue or unreasonable preference or advantage.

Section 6 (1) of the Act provides that every common carrier subject thereto shall file with the Commis-

sion, and print and keep open to public inspection, schedules showing all the rates for transportation not only between "different points on its own route," but also "between points on its own route and points on the route of any other carrier by railroad, * * * when a through route and joint rate have been established."

Section 6 (4) of the Act requires concurrences of all participating carriers in joint tariffs.

Section 6 (7) of the Act provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, * * * which are specified in the tariff filed and in effect at the time"; and, further, that no carrier shall "refund or remit in any manner or by any device any portion of the rates, * * * so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 13 (2) of the Act authorizes the Interstate Commerce Commission to institute investigations on its own motion, and to issue orders in connection therewith.

Section 15 (13) of the Act provides that if the owner of property, transported under Part I of the Act, directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed with the Commission.

STATEMENT OF THE CASE.

I. Proceedings Before the Commission.

After report, order, and citation of the Commission in *Investigation and Suspension Docket No. 4599, Allowances on Cottonseed at C. & G. Ry. Points*, 238 I. C. C. 309, an investigation, hereinafter referred to as the "Investigation proceeding," was instituted, upon the Commission's own motion, into and concerning the lawfulness of the rates, charges, rules, regulations, and practices, published in Columbus & Greenville Railway Company, hereinafter referred to as "Columbus and Greenville," freight tariff No. 9-B, I. C. C. No. 81 (R. 5-13), providing refunds, sometimes called "cut-back," to shippers of outbound cottonseed products from manufacturing or mill points on its line in instances where the inbound shipments of cottonseed moved into the mill points over the lines of other rail carriers. Exceptions to the proposed report of the examiner in the Investigation proceeding were filed by (respondent) appellee herein; replies thereto were made by (interveners) appellants herein, and the issues were orally argued.

In the former proceeding, *Allowances on Cottonseed at Columbus & Greenville Railway Points*, supra, the Commission found unlawful (respondent's) appellee's freight tariff No. 9-C, I. C. C. No. 83, providing substantially the same refund or cut-back as published in appellee's tariff I. C. C. No. 81, which proposed to supersede and cancel the latter tariff (R. 56). The Investigation proceeding was instituted by the Commission on its own motion, to accord appellee a full hearing as to the lawfulness of its tariff I. C. C. No. 81.

It was stipulated before the Commission, by the parties, that the record and findings of fact in the prior proceeding, 238 I. C. C. 309, by reference, be made a part of the

record in the Investigation proceeding before the Commission to be supplemented by any documentary evidence and oral testimony that the parties desired to present, with the provision that the findings of fact in the prior report (238 I. C. C. 309) were not to be considered conclusive in the Investigation proceeding.

Appellee publishes in its tariff (Freight Tariff No. 9-B, I. C. C. No. 81) (R. 13-18), rates and rules governing transit privileges on cottonseed in carloads manufactured or processed at various points on its line. Under this tariff appellee applies the so-called "cut-back" rates on cottonseed originating at points *on and moving via lines other than* the Columbus and Greenville to mill points on its line when the manufactured products thereof are reshipped from the mill point via *its* lines.

This tariff provides that the Columbus and Greenville shall make a refund to the shipper of the manufactured product on presentation of freight bills *of other lines*, through claim channels, although the Columbus and Greenville did not participate in the inbound road haul to the mill point.

For example, J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, hereinafter referred to as "Frisco," originates, at points on its line, shipments of cottonseed which are transported to Columbus, Mississippi, under normal rates, on which, upon reshipment via the Frisco of the products of the inbound seed, readjustment is made of the inbound rates paid on the seed to the basis of so-called "cut-back" rates published by the Frisco. The Columbus and Greenville, by the tariff in issue, has undertaken to refund to the shipper a part of the outbound rate it collects, based upon the inbound rates *paid to the Frisco* in consideration of the movement of the manufactured product over the Columbus and Greenville from Columbus.

On a shipment of cottonseed moving to a mill point over the Frisco, notwithstanding the fact that the inbound charges are collected by the Frisco for transportation services which it performs, and in which *the Columbus and Greenville in nowise* participates, that company is undertaking, through the tariff in issue, to authorize a refund predicated upon the charges collected by the Frisco. In effect, on the outbound movement of the manufactured products from the mill point, the Columbus and Greenville retains charges at less than the published rates. In other words, the tariff of the Columbus and Greenville undertakes to authorize the payment to the shippers of a refund to be made from the revenues earned in connection with the movement of the manufactured product outbound from Columbus, such refund, in effect, necessarily representing either a part of the transportation charges collected by the Frisco for services which it performed on the inbound movement of the cottonseed in which the Columbus and Greenville did not participate and consequently received no part of the revenue therefor, or a tantamount reduction in, or departure from, the applicable tariff rates on the manufactured products shipped via the Columbus and Greenville from the mill points.

Throughout this case appellee has attempted to place the burden of proof upon the rail appellants as to the lawfulness of rail appellants' cut-back rates. Clearly these rates are not in issue, as properly found by the Commission, 248 I. C. C. 441. Compare with *Lawrenceville Cooperage Co. et al. v. A. C. & Y. Ry. Co. et al.*, decided November 14, 1939, 235 I. C. C. 155.

Rail appellants contend that the tariff is unlawful and unreasonable in violation of Interstate Commerce Act in the respects as found by the Commission. They have also contended throughout the proceedings that the tariff in issue was also a violation of Section 2, Section 3 (1) and Section 15 of that Act.

It is not the purpose of appellants in this brief to discuss the lawfulness of the cut-back rates of the Illinois Central Railroad Company, hereinafter referred to as "Illinois Central" and the Frisco, *the only matter before the Court being the tariff of the Columbus and Greenville Railway* which attempts to make refunds to shippers at points on their line where the inbound shipment is *moved in by some other carrier.*

Pertinent Facts as Found by the Commission.

The pertinent facts respecting the tariff in issue and the way in which it applies are well stated by the Commission as follows, 248 I. C. C. 441, l. c. 442-446:

> "Excerpts from tariff I. C. C. No. 81, which purports to publish rates and rules governing transit privileges on cottonseed, in carloads, at Columbus, Greenville, Greenwood, Indianola, Moorhead, and West Point, Miss., are as follows:
>
> "Item 5 (a) provides that the rates and rules published therein will apply on cottonseed, in carloads, from stations on the Columbus & Greenville Railway, or on cottonseed, in carloads, received from connecting lines at Columbus & Greenville Railway junction points with such lines to the named manufacturing or mill points for cracking, crushing, etc., and the subsequent shipment of the product, as described in Item 10, from such points via the Columbus & Greenville Railway.
>
> "Item 5 (b) provides that the rates will also apply on cottonseed, in carloads, from stations on connecting lines and moving via such lines to the above-mentioned manufacturing or mill points on the Columbus & Greenville Railway, when the products of cottonseed as described in Item 10 are subsequently shipped in carloads, or less-than-carload quantities, from such manufacturing or mill points via the Columbus & Greenville Railway.
>
> "Item 5 (c) provides that the rates published in the tariff may not be used in waybilling shipments, and

that all shipments must be waybilled at the full local or joint rates lawfully applicable to the manufacturing or mill points proper in effect on the date of shipment from the point of origin.

"Item 5 (d) provides that upon evidence of the shipment of the product in carloads, or less-than-carload quantities, over the Columbus & Greenville Railway at full published tariff rates applying from the manufacturing or mill point, the freight charges on cottonseed to the manufacturing or mill point will be reduced to the basis of rates shown in Item 40 through freight claim channels.

"Item 40 sets forth a mileage scale of rates designated to apply on cottonseed, carloads, minimum 30,000 pounds. The rates in this item are applied on the basis that for every 100 pounds of weight represented by inbound freight bills on cottonseed, surrendered for refund, there must be furnished evidence of shipment from the manufacturing or mill point of 93 pounds of cottonseed products. When inbound bills are surrendered at this ratio, the rates in Item 40 are applied to 93 per cent of the weight of the cottonseed.

"Item 25 provides that in the event changes are made in the rates and rules published in this tariff after the cottonseed is shipped from point of origin, the rates and rules in effect on date of the shipment from point of origin or mill point will apply.

"Briefly stated, the justification offered by respondent for its tariff I. C. C. No. 81 is that the tariff is primarily a local tariff publishing rates and rules governing transit privileges on cottonseed, in carloads, at mill points on its line; that the tariff applies locally from all points on its railroad to all mill points located thereon; that the transit privilege incorporated in the tariff by adjustment through claim channels, equalizes the net charge to the shipper for the total haul of the cottonseed and products thereof with charges resulting from the application of cut-back rates in tariffs of the connecting lines, including the protestants, at common mill points; that tariff I. C. C.

81 grants a privilege at the expense of respondent, and that the privilege is granted solely for the purpose of equalizing the net transportation cost to the shipper of the product from mill point to destination; that the tariff publishes no rates for application on the inbound movements; that the rates for the inbound movements of cottonseed are published in tariffs, local or joint, governing the movement to the mill point; likewise, the rates on cottonseed products from the mill point are published in tariffs, local or joint, governing the movement from the mill point; that the tariff here in issue is only a means to equalize the rates applicable to the movement of cottonseed to mill points therein named and the movement of the products manufactured therefrom to destinations over routes of respondent and its connecting lines with the rates over the routes of competing carriers; and that the resultant rates under the tariff here in issue on the movement of the seed to the mill, the movement of the product therefrom, or the aggregate of both, are identical with those available over competing carriers.

"The following excerpt from the record illustrates the application of the tariff:

" 'Take a shipment of cottonseed from Coahoma, Miss., a point on the Y. & M. V. Railroad, to Greenville, a distance of 87 miles. On the initial movement to Greenville the rate is 8.4 cents per 100 pounds. That rate is assessed and collected when the seed moves to Greenville. It is not the rate published in respondent's cut-back tariff, nor in the cut-back tariff of the Y. & M. V. Railroad. It is, however, the local rate of the Y. & M. V. Railroad as published in its tariff lawfully on file with the Interstate Commerce Commission. When the cottonseed oil is reshipped by the Columbus & Greenville Railway, a rate of 48 cents per 100 pounds, which is the full joint rate by way of the respondent and its connections from Greenville to Cincinnati, is assessed and collected and subsequently, and within 15 months from the date of issue of the bill of lading, the shipper files his claim for the privileges

granted under the tariff in question (I. C. C. No. 81). This respondent will refund the shipper to basis of rate set forth in its tariff for 87 miles, or 7 cents. * * * The net cost would be, then, 7 cents to Greenville, plus 48 cents beyond, or a total of 55 cents per 100 pounds.

"'Q. Mr. Hawkins, assuming that the product from the seed in the example given had moved from the mill point, Greenville, Miss., to Cincinnati, Ohio, by way of the Y. & M. V. Railroad, a connecting and competing carrier at that point with the C. & G., what would have been the net cost to the shipper for the through movement?

"'A. The net cost would have been exactly the same. The mechanics of the tariff would have been the same. That is, that line would have assessed a rate of 8.4 cents on the initial movement; then upon reshipment that line would have assessed the same rate, that is, 48 cents; then subsequently, and within 15 months, it would have, upon presentation of claim, readjusted through claim channel the charges to the basis that would apply if the shipment moved over respondent's line. In other words, the net cost to the shipper is the same, however it moves.

"'Q. Now, on your illustration there from Coahoma to Greenville * * * what carrier would collect the local rate?

"'A. The Y. & M. V. Railroad.

"'Q. And if that shipment were moved from Greenville, or the products of the seed shipped from Greenville to Memphis via the Columbus & Greenville Railroad, how would the charges be refunded by the Columbus & Greenville?

"'A. Just like they are by the Y. & M. V., upon evidence of reshipment and upon presentation of claim we would refund the shipper the difference between the 8.4-cent rate from Coahoma to Greenville, and the cut-back rate of 7 cents, or 1.4 cents, which would allow the Y. & M. V. its full local rate into Greenville and, additionally, will allow them full representation

and participation in the movement from Greenville to Memphis, the illustration you used.

" 'Q. Now, as I understand it, the Y. & M. V. are paid their full local. If the shipment moves from Greenville by the Y. & M. V. they reduce their local rate down to the cut-back, and their tariff similar to the C. & G. tariff, do they not?

" 'A. You can call it anything you want to. They refund the shipper the difference between 8.4 cents paid to the mill point and a fictional rate of 7 cents.

" 'Q. What do you mean by a fictional rate?

" 'A. I mean it has no application other than a basis for refunding the inbound rate to a lower basis.'

"Respondent is not a party to the inbound rates on cottonseed from points on the lines of its connecting rail carriers to the named mill points on its line, and no other carrier is a party to its tariff I. C. C. No. 81. The refunds, or cut-back, are exactly the same in amount as those of the other carriers serving the mill points. The difference between the practice of respondent and those of the other carriers is that it makes an allowance on seed that does not originate on its own line, and absorbs the allowances so made out of its proportion of the outbound rates to which it is a party. The purpose of making the refund is to enable it to compete for traffic that might otherwise move outbound over the lines that originated the seed. The originating lines hold themselves out to cut-back their local inbound rates on the seed which they originate in order to induce the shipper to move the outbound products over their lines. If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's tariff, as the inbound shipments move from origin points to the mills at the local rates, under separate bills of lading.

"The reason given by respondent for the opposition to its cut-back tariff by interveners is that it will interfere with their practice of recapturing the outbound traffic from the mill points by means of their cut-back rates on the inbound cottonseed. Respondent

contends that it has the right to offer the same concession as interveners, on the ground that the inbound carrier of the cottonseed to the mill point has no inherent or vested right to the outbound haul of the products manufactured from the seed, citing Atchison, T. & S. F. Ry. Co. v. United States, 279 U. S. 768. The court, among other things, said:

" 'This convenient fiction is employed as a justification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound. * * * There is no rule of law or practice which gives a carrier the right to recapture traffic which it originated.'

"Interveners emphasize a distinction in that the tariff of respondent attempts to name rates for account of their lines without their concurrence, whereas their tariffs apply solely on shipments of cottonseed which they transport over their lines to the mill point. The legality of interveners' tariffs is not in issue; however, this is an important difference between the application of the respective tariffs. On the question of equality of the rates raised in the former proceeding, division 3 said:

" 'Instead of placing itself on an equal basis with its competitors, respondent's present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier.'

"Section 6 of the Interstate Commerce Act provides that every common carrier shall publish tariffs showing the charges for transportation between different points on its own line and between points on its own line and points on the line of any other carrier. Where no joint rate over the through route has been established, as in this case, the several carriers in such through route are required to file the separately established rates applicable to the through transportation. The form and manner in which respondent's tariff is published clearly does not conform to the requirements

of section 6 (1) and (4) of the act. The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the act.

"Respondent provides the same cut-back for cottonseed originating on its line which it brings into the mill points as do the other carriers serving those points. No objection is made to that practice. Respondent originates some 15 or 20 per cent of the cottonseed milled at the junction points. Some 50 per cent of the inbound seed is brought into the mill points by truck. This leaves some 30 or 35 per cent of the total traffic possibly subject to respondent's cut-back on traffic originating on other lines. No provision is made for refund to shippers on that portion of the traffic brought into the mill points by truck. Upon oral argument, it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute."

II. Proceedings Before the Three-Judge Court.

The appellee filed its complaint in the District Court (R. 1-52) to enjoin and set aside the operation and effect of the order of the Commission in Docket No. 28,590, entitled "*Cottonseed Allowances of Columbus and Greenville Railway Company*," issued January 3, 1942, as amended, to become effective April 28, 1942 (R. 5-13).

The United States of America and the Interstate Commerce Commission were named as defendants. J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, and the Illinois Central Railroad Company, which were interveners in the proceeding before the Commission, were also named as parties defendant (R. 1).

On April 3, 1942, an order was issued organizing a three-judge court and fixing April 24, 1942, as the date for the hearing on the issuance of an interlocutory injunction (omitted in printing).

An answer, dated April 17, 1942, to the complaint was filed on behalf of the Interstate Commerce Commission (R. 53-54).

An answer, dated April 21, 1942, was filed on behalf of the United States of America (omitted in printing).

A joint answer, dated April 21, 1942, was filed on behalf of the Illinois Central Railroad Company and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor (R. 54-55).

On April 24, 1942, prior to the oral argument, the Court authorized the appellee to amend its original complaint and the railway appellants to amend their answer (omitted in printing).

The various parties filed their memorandum briefs, and the case was orally argued before the Court on April 24, 1942.

On April 24, 1942, an order directing the issuance of an interlocutory injunction was issued (omitted in printing).

On July 31, 1942, the three-judge Court rendered its opinion, reported in 46 F. Supp. 204, finding that the appellee was entitled to the relief sought (R. 66-71).

On motion of appellants, the Court, in an order dated November 19, 1942, extended the time in which to file and docket this appeal to this Court to January 5, 1943. From that order a direct appeal was taken to this Court.

SPECIFICATION OF ERRORS TO BE URGED.

The Three-Judge Court erred—

(1) In finding that appellee, by publishing the condemned tariff, was not seeking any advantage, but was only seeking equality;

(2) In finding that without this tariff appellee's right to compete for this outbound freight is destroyed;

(3) In holding that appellants' tariffs are very material to a correct solution of the validity of the appellee's tariff;

(4) In holding that appellee's tariff does not affect the outbound rate of connecting carriers;

(5) In finding that appellee's tariff is essentially the same as those of the appellants' lines;

(6) In holding that the outbound freight rate is in no way affected by the terms of appellee's tariff;

(7) In holding that appellee is entitled to the relief sought;

(8) In sustaining the tariff in question, and in substituting its judgment for that of the Interstate Commerce Commission on administrative matters which have been placed by Congress within the jurisdiction of the Interstate Commerce Commission;

(9) In failing to sustain the order of the Interstate Commerce Commission;

(10) In failing to dismiss the suit for want of equity;

(11) In entering the interlocutory order of April 24, 1942, temporarily restraining the enforcement of the order of the Commission, and

(12) In making and entering the final decree of August 17, 1942, permanently enjoining, annulling and setting aside the order of the Interstate Commerce Commission.

SUMMARY OF ARGUMENT.

Appellants contend that the tariff of the Columbus and Greenville, I. C. C. No. 81, is unlawful and in violation of Sections 1 (6), 2, 3, 6 (4), 6 (7), and 15 (13) of the Interstate Commerce Act in that it purports to name rates on cottonseed to various mill points on its line in which the Columbus and Greenville do not participate in the transportation of the traffic, and that it purports to name joint rates from points on its connecting rail lines to mill points on its line moving jointly via such connections and the Columbus and Greenville without procuring the necessary concurrence of such connecting rail lines; they are not named as participating carriers in the tariff here in issue. While the tariff by its title page would indicate that it names transit privileges at mill points on the Columbus and Greenville, a matter of sole concern to the Columbus and Greenville, the tariff in substance clearly purports to name rates on carload shipments of cottonseed.

Appellants contend that the Commission, in holding that the tariff in issue was published in a form and manner which was not in conformance with the standards set up by Section 6 (1) and (4) of the Act, and that its operation resulted in a practice which was unreasonable and hence unlawful under the provisions of Section 1 (6) of the Act, was exercising its judgment and discretion on a fully administrative matter entrusted by Congress to the Commission alone. Appellants urge that the three-judge court erred in substituting its judgment for that of the Commission on these technical and administrative questions.

ARGUMENT.

The issue in this proceeding involves the validity of an order of the Interstate Commerce Commission (R. 12-13), whereby the appellee, the Columbus and Greenville Railway, was ordered to cancel its Tariff I. C. C. No. 81. The Interstate Commerce Commission found that appellee's Tariff I. C. C. No. 81 provided for a refund or cut-back to the shipper on traffic originated and hauled to the mill points by other rail carriers in violation of Section 1 (6), Section 6 (4) and Section 6 (7) of the Interstate Commerce Act.

The tariff, while by its title page indicates it publishes transit privileges on cottonseed in carload quantities, in fact, purports to publish rates on cottonseed from points on lines *other* than the Columbus and Greenville to mill points on the Columbus and Greenville, but in which the Columbus and Greenville does not participate. Also, it purports to publish rates on cottonseed from points on connecting lines of the Columbus and Greenville moving jointly via such lines and the Columbus and Greenville, although the connecting lines of the Columbus and Greenville are not named as participating carriers and do not concur in the tariff.

The Columbus and Greenville Railway issued its Tariff I. C. C. No. 81 for the purpose of placing it in a position to participate in the movement from the manufacturing or mill points of products obtained from cottonseed originating on other rail lines, *and moving via such other rail lines to the manufacturing or mill points.*

It will be noted by referring to Item 35 of the tariff here in issue that *the basis for the refund referred to therein is the difference between the charges on the inbound movement of the cottonseed and the rates published in the Columbus and Greenville Tariff I. C. C. No. 81.*

In no section of the tariff is any reference made to any readjustment of the charges on the shipments of the product from the manufacturing or mill point. The tariff clearly purports to name rates on cottonseed, not only from points on the Columbus and Greenville, but also *from origin points on connecting lines* when shipments move via other lines and the Columbus and Greenville, and from origin points on other lines when shipments move from such points to the manufacturing or mill point *via such lines only* (the Columbus and Greenville not participating in such movement). To the extent that the tariff purports to name rates on shipments of cottonseed originating on and moving via other lines, or, from connections of the Columbus and Greenville in connection with the Columbus and Greenville to the mill points it is of no force and effect. No carrier other than the Columbus and Greenville is shown as a concurring or participating carrier therein.

In *Brenner Lumber Co. v. Director General*, 66 I. C. C. 595, the Commission considered the legality of a tariff of the Texas & Pacific Railway Company purporting to designate joint rates to be applied on lumber from a transit point to destination.

The shipments involved consisted of lumber manufactured at Alexandria, Louisiana, from logs shipped over the Texas & Pacific from points in Louisiana. The lumber also moved from Alexandria over the Texas & Pacific. The question before the Commission was whether under the provisions of the respective tariffs naming the log rates to, and the lumber rates from, Alexandria, the rates applicable were those in effect when the shipments of logs originated, or the higher rates in effect when the lumber was forwarded from Alexandria. Charges were collected on the latter basis. The local tariff of the Texas & Pacific, under which the logs moved to Alexandria, contained, among others, the following provision:

"The rate to apply on the products moving out of the transit point under this Tariff will be that in effect from the transit point to destination on date of shipment from point of origin of the Rough Material."

The transcontinental tariffs under which the shipments of lumber moved from Alexandria to destination contained a restriction with respect to the application of transit privileges to the effect that *transit would be permitted only when specific authority therefor was published in those tariffs* immediately in connection with the rates on the commodity. The Commission said, l. c. 597:

"The essential facts are that the shipments of logs were hauled to Alexandria and there manufactured into lumber at rates and under rules published in the Texas & Pacific's local tariff, to which other lines were not parties; that the lumber rates outbound were published in separate tariffs which contained no reference to the tariff of the Texas & Pacific; and that the shipments did not assume the character of lumber shipments, and did not become subject to the transcontinental tariffs, until they were delivered to the carriers at Alexandria for further transportation. It is clear that the transit provisions of the transcontinental tariffs, which named rates on lumber from Alexandria to the destination here considered, and which did not sanction the Texas & Pacific's transit rule, referred only to transit on the commodity transported and not to the prior transit on the logs at Alexandria. It follows that the transcontinental tariffs were neither governed by I. C. C. 2014 nor had the effect of nullifying the unrestricted provisions of that tariff wherein shippers were notified that when the lumber manufactured from logs transported thereunder to Alexandria moved via the Texas & Pacific to 'interstate destinations to which through rates are published in tariffs on file with the Interstate Commerce Commission,' the rates to apply would be those in effect from Alexandria to destination 'on date of

shipment from point of origin of the rough material.' *Although the rates charged were applicable, the effect of item 43½ of I. C. C. 2014 was that the Texas & Pacific published by reference, without the concurrence of its connections, the joint rates contained in the transcontinental tariffs in effect when the shipments moved. Such a publication of rates was in direct contravention of our rules made under authority of Section 6 of the act.* Complainant was justified in relying upon the lower basis of rates thus offered and thereby suffered damages for which we may award reparation."

The principle announced by the Commission in the above decision to the effect that the Texas & Pacific Railway Company tariff in publishing rates without the concurrence of its connections was unlawful is controlling in the instant case, and, therefore, the tariff of the Columbus and Greenville must be found to be unlawful as found by the Commission. *First*, it purports to name joint rates on cottonseed from stations on connecting railway lines of the Columbus and Greenville to the mill or manufacturing points on the Columbus and Greenville without the concurrence of its connecting railway lines in violation of Section 6 (4) of the Interstate Commerce Act; *Second*, it purports to name rates on cottonseed in the movement of which the Columbus and Greenville does not participate from points of origin to the mill or manufacturing points, which is, in effect, a mere device to accord a rebate to shippers, in violation of Section 1 (6) of the Interstate Commerce Act.

The distinction between the application of the tariffs of appellant railroads and the tariff of the Columbus and Greenville is that the latter attempts to name rates for account of other lines without their concurrence, whereas, tariffs of appellant railroads apply solely on shipments of cottonseed which they transport via their respective lines to the mill or manufacturing points.

While the legality of the tariffs of appellant railroads is not an issue in this proceeding, it is necessary to bear this difference between the applications of the respective tariffs in mind, as appellee, to a great extent, relies upon justification of its tariff as being merely a means of meeting competition afforded by the rates available on shipments of cottonseed under the tariffs of appellants. However, as pointed out by the Commission in 238 I. C. C. 309, l. c. 313:

> "Instead of placing itself on an equal basis with its competitors, respondent (appellee's) herein *present effective* and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier." (Italics ours.)

Appellee makes no contention that the shippers, in connection with the movement of cottonseed to the mill or manufacturing point or in connection with the movement of products therefrom, perform any transportation service for account of the Columbus and Greenville which the Columbus and Greenville is required to perform. There is no dispute as to the fact that the shippers do not perform any service of this character; this being true, the refunds which the Columbus and Greenville purports to accord shippers of cottonseed products from the manufacturing or mill points cannot be clothed with legality as "allowances," as such refunds, under the circumstances, would be clearly in violation of Section 15 (13) of the Act. As pointed out by the Interstate Commerce Commission in its report in the prior proceeding, 238 I. C. C. 309, l. c. 315:

> "Refunds contemplated by the suspended schedules, although denominated allowances, are not allowances within the meaning of the term 'allowance,' as used in Section 15 (13) of the Act, because the shippers or owners of the traffic do not perform any part of the transportation service."

The fact that these refunds are made pursuant to a tariff on file with the Interstate Commerce Commission does not change the situation. As was said by the Commission in *Rates for Transportation of Anthracite Coal*, 35 I. C. C. 220, l. c. 243:

> "The term 'lateral allowance' in the carrier's tariffs was and is misleading, for the reason that the allowances *were not paid for* the purpose of compensating the shipper for any *service or for* the use of any instrumentality connected with the transportation of its shipments, as defined in section 15 of the act to regulate commerce. Under these circumstances, even *if the amounts of these allowances were published, their payment is the payment of a rebate, and hence unlawful.*" (Italics ours.)

In *Merchants Warehouse Co. v. United States et al.*, 283 U. S. 501, it appeared that payments were made by carriers to a warehouse for the service of assembling and loading package freight for shipment in individual carload shipments and of unloading and distributing like incoming consignments. In commenting upon the practice the Court, inter alia, said, l. c. 510-511:

> "Such allowances are forbidden, even though paid to appellants and their *competitors alike*, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by Sections 2 and 3 of the Interstate Commerce Act. * * *" (Italics ours.)

In *Lehigh Valley Railroad Company v. United States*, 243 U. S. 444, the Court said:

> "If the shipper were the owner an allowance to him of a percentage upon the freight as an inducement to ship by that line, *however honest and however justifiable on commercial principles, would be contrary* to the Act to Regulate Commerce as it now stands" (l. c. 444-445).

"Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words" (l. c. 446).

In *Drayage Absorptions by Southwest Missouri Railroad Company*, 113 I. C. C. 179, the Commission's report discloses that pursuant to the tariff under consideration in that proceeding, the railroad company, out of its published tariff rate for rail transportation, made to certain shippers at certain mines, either directly or through the medium of payments to teamsters employed by and under the direction and control of those shippers, specified rebates varying in amount in inverse ratio with the accessibility of such mines to that carrier's rails. The practice was condemned as being unlawful.

Rail appellants contend that the decision of this Court in *Atchison, Topeka & Santa Fe Railway Company et al. v. United States et al.*, 279 U. S. 768, cited to the three-judge court by appellee, is not applicable to the facts of the present case. The Santa Fe, after the grain moved from the country point of origin to the mill point and freight charges were paid, attempted to collect, in the event the commodity was shipped out by the Kansas City Southern or other rail carrier, *an additional* 4 cents per hundred pounds on the inbound rate. The Columbus and Greenville in the instant case has the same rate outbound from the common mill points as the Frisco and the Illinois Central. *The outbound rates to the interstate destinations are published in joint through tariffs in which the carriers concur.* All are on the same basis. The Commission was correct in finding that if the Columbus and Greenville were allowed to make this refund they would be in a more advantageous position as to the outbound rate than the protestant carriers.

Some conclusion should first be reached as to the meaning of the term "refund." The word "refund" connotes

that something has been paid by the shipper to the carrier, but in the application of the tariff in issue the Columbus and Greenville is attempting to refund to the shipper part of the charges for transportation services performed by and paid to other carriers on the inbound movement of the seed.

Appellants do not take issue with the finding of the Commission that transit is a privilege local to carriers publishing such tariff, as decided by this Court in *Central Railroad Company of New Jersey et al. v. United States and Interstate Commerce Commission*, 257 U. S. 247, but do respectfully submit that this decision cited by appellee has no bearing on the issues here presented. The title page of the tariff here in issue would indicate that it provides transit privileges, a matter of sole concern to the Columbus and Greenville. The fact is that the tariff purports to name rates on cottonseed from stations on other lines to mill points on the Columbus and Greenville which moves solely via the lines of such other carriers.

Throughout this entire case rail appellants have contended that the tariff in controversy of the Columbus and Greenville is, as a matter of fact, a rebate or an attempt to purchase traffic for its line. On page 5 of appellee's petition for reargument before the Commission, appellee frankly admits that the "privilege it extends * * * and the practice is entirely at its expense." In the same paragraph it is alleged that the schedule in issue equalizes conditions, but this Court in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, l. c. 46, stated:

> "The law does not attempt to equalize fortune, opportunities or abilities."

As previously explained in this brief, the Columbus and Greenville tariff provides that even though the Columbus

and Greenville has not participated in the inbound haul of the cottonseed to the mill point, nevertheless the Columbus and Greenville will make a refund to the shipper if he ships the manufactured product outbound from the mill point over the Columbus and Greenville. These outbound hauls are to interstate destinations via a number of carriers—the Columbus and Greenville being the initial carrier—participating in the haul and joining in the joint rate applicable to that outbound haul. The refunds made by the Columbus and Greenville are absorbed by it out of its proportion of those outbound joint rates.

After describing the nature of the Columbus and Greenville tariff, the Commission called attention to the provisions of Section 6 of the Act. Section 6 (1) requires that every carrier publish tariffs showing the charges for transportation between points on its own line and between points on its line and points on the line of any other carrier. Section 6 (4) requires the concurrence of all carriers parties to a joint rate applying in connection with their respective lines.

In its report the Commission observed that the effect of the Columbus and Greenville tariff is to make available to the outbound shipper a rate lower than the joint rate which the Columbus and Greenville and its connections have published and which is on file with the Commission. The Columbus and Greenville, by means of this tariff which it alone has published and to which no other carrier is a party, is actually reducing the joint outbound rate without the concurrence of the other carriers parties to that joint rate.

After making those observations and after calling attention to the requirements of Section 6 of the Act, the Commission concluded that:

> "The form and manner in which respondent's [appellee's] tariff is published clearly does not con-

> form to the requirements of section 6 (1) and (4) of the act."

The Commission also held that:

> "The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the act."

Section 1 (6) of the Act requires carriers to establish and observe "just and reasonable regulations and practices affecting classification, rates, or tariffs * * *," and provides that "every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

It is the position of these appellants that

> (1) the Commission, in finding that the form and manner in which the Columbus and Greenville tariff is published does not conform to the requirements of the Act, and in finding that the refunding device set up by that tariff is an unreasonable and unlawful practice, was exercising its judgment on purely administrative matters which have been placed by Congress within the exclusive jurisdiction of the Commission; and
>
> (2) the three-judge court, in sustaining the Columbus and Greenville tariff erred in substituting its judgment for that of the Commission on such administrative questions.

Section 6 of the Act requires that tariffs and concurrences be filed with the Commission. The Commission held the form of the Columbus and Greenville tariff and its manner of being filed and published did not conform to the requirements of that section. This Court has held on prior occasions that it is solely up to the Commission to determine whether or not tariffs are properly published and filed with it.

In *Norfolk Southern R. R. Co. v. Chatman*, 244 U. S. 276, the form in which charges were set up in a tariff of the Pennsylvania Railroad Company was objected to, but this Court declined to consider the objection, saying, l. c. 284:

> "The objection that the published tariff of the Pennsylvania Company did not specify how much of the stipulated payment by the plaintiff should be treated as payment for the transportation of the stock and how much for the transportation of the caretaker, and that the payment for the carriage of the plaintiff was not separately stated in a passenger tariff, cannot be considered in this case for the reason that the *Act to Regulate Commerce* (Sec. 6, as amended June 29, 1906, June 18, 1910, and August 24, 1912) *commits to the Interstate Commerce Commission the determining and prescribing of the form in which tariff schedules shall be prepared and arranged, and this is an obviously administrative function with which the courts will not interfere in advance of a prior application to the Interstate Commerce Commission. Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 232 U. S. 199, 221; *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138." (Italics ours.)

Another decision of this court supporting appellants' contention is *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 232 U. S. 199, where this Court said, l. c. 220-221:

> "What is a proper rate on fruit in precooling shipments, or a fair charge for hauling necessary ice or rendering other transportation services are all rate-making matters committed to the Commission. It may determine what shall be the difference in rate between carload and less-than-carload lots. It may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article. *It may pre-*

> *scribe the form in which schedules shall be prepared and arranged* (§ 6) and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. *All these are matters committed to the decision of the administrative body*, which, in each instance, is required to fix reasonable rates and establish reasonable practices. *The courts have not been vested with any such power. They cannot make rates. They cannot interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those ordered are void.*" (Italics ours.)

These two decisions by this Court, we submit, reveal the error committed by the lower court. The Commission has in two proceedings, after full hearings and mature consideration, found that the Columbus and Greenville tariff is not published in the *form or manner* which, in its opinion, is called for by section 6 (1) and (4) of the Act. What is a proper *form and manner* is for the Commission alone to say. Yet the effect of the lower court's decision is to hold that the Columbus and Greenville tariff *is* published and filed in a proper form and manner under the Act. The three-judge court has therefore invaded the domain which Congress has committed exclusively to the Interstate Commerce Commission.

The second ground on which the Commission found the Columbus and Greenville tariff unlawful was:

> "The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent [appellee] is a practice made unlawful by section 1 (6) of the Act."

As explained before, the Commission, in its report, observed how the Columbus and Greenville, by means of this tariff, makes available to shippers a rate outbound from the transit point lower than the joint outbound rate actually published and filed by the Columbus and Greenville and its connections. The Commission called attention to the fact that this reduction of the joint rate was effected by the Columbus and Greenville without the concurrences of the Columbus and Greenville's connections, parties to the joint rate. This the Commission held was an unlawful practice under section 1 (6) of the Act.

Here, again, the Commission's holding was the result of its exercise of technical and informed judgment on an administrative question. Whether the making of refunds to shippers under those conditions was a reasonable or unreasonable practice is for the Commission and not a court to say. This Court has so held.

In *Great Northern Ry. Co. et al. v. Merchants Elevator Co.*, 259 U. S. 285, this Court said, l. c. 291:

> "*To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function.* To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of *discretion in technical matters;* and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." (Italics ours.)

The effect of the three-judge court's decision in the instant case is to hold the practice of making refunds under the Columbus and Greenville tariff and under the conditions making that tariff operative, a reasonable and lawful one despite the Commission's holding to the contrary. The Commission found that the making of refunds in the form and manner employed by the appellee's tariff is an unreasonable and unlawful practice. This Court has said in *Virginia Railway Co. v. United States*, 272 U. S. 658, l. c. 665-666:

> "*The finding of reasonableness*, like that of undue prejudice, *is a determination of a fact by a tribunal* 'informed by experience.' *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541. It was shown that a huge coal traffic moves from this territory, under like operating conditions, at the blanket rates which were voluntarily established by the other carriers to serve mines similarly located. This fact, and much else in the voluminous record, afford substantive evidence to support the finding that the existing rates are unreasonable; and that those which the order directs are reasonable." (Italics ours.)

The following from *Board of Railroad Commissioners v. Great Northern Ry. Co.*, 281 U. S. 412, delineates the function and action of the Commission in the instant case, l. c. 421-422:

> "The inquiry would necessarily relate to technical and intricate matters of fact, and the solution of the question would demand the exercise of sound adminis-

> trative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discrimination must depend."

Appellants submit therefore that the three-judge court erred in finding the Commission's order invalid and in substituting its judgment for the judgment of the Commission on whether the appellee's tariff is filed in a proper form and manner and whether the making of the refunds authorized by the tariff constitutes a reasonable or unreasonable practice under the Interstate Commerce Act.

CONCLUSION.

Briefly stated and boiled down, this tariff provides, *inter alia*, that the Columbus and Greenville will grant a refund to the shippers of cottonseed products from the mill or manufacturing points when the raw products, the cottonseed, is shipped to the mill or manufacturing points *exclusively over another railroad*, the sole consideration therefor being the movement outbound of the cottonseed products via the Columbus and Greenville, without any transportation service being performed by the Columbus and Greenville on the *inbound shipment*. The tariff also provides that the Columbus and Greenville will grant a refund to the shippers of cottonseed products from the mill or manufacturing points when the raw products, the cottonseed, is shipped to the mill or manufacturing points via other carriers and the Columbus and Greenville jointly, although such other carriers do not concur in nor are they named participating carriers therein.

The Columbus and Greenville in its tariff (Item 35 in Freight Tariff No. 9-B, I. C. C. 81) speaks of "claims for refund of charges on the inbound movement." It cannot possibly make a "refund" of charges on the inbound movement when it did not receive any part of those charges in the first place, as in the case of inbound seed movements via lines other than the Columbus and Greenville, nor can it refund a part of the inbound charges on shipments of seed moving to the mill points via its line originating on and moving jointly via other lines and the Columbus and Greenville, in effect reducing the applicable tariff charges on such shipments without the concurrence of its connections. They are not named as concurring carriers in the tariff in issue. The word "refund" in the tariff is, therefore, a *misnomer*. It is nothing more or less than an *allowance*, as the Columbus and Greenville so termed it in its Tariff I. C. C. No. 83, found unlawful in 238 I. C. C. 309. Such a payment to a shipper, whether it be termed a refund, an allowance, or any other similar term, constitutes a violation of Section 1 (6), Section 6 (4), Section 6 (7) and Section 15 (13) of the Act.

It is further submitted by these rail appellants that the tariff in question is unlawful and unreasonable, and that the order of the Interstate Commerce Commission instituting an investigation of this tariff was fair, just and reasonable, and that the Commission entered its further order requiring its cancellation after a full hearing upon proper evidence submitted before it; that there is no evidence before the Court to show there is any deprivation of appellee's property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Wherefore, appellants respectfully submit that the decree of the three-judge court should be reversed and the case remanded with directions to dissolve the injunction.

Respectfully submitted,

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APPENDIX A.

STATUTES CITED.

Part I of the Interstate Commerce Act.

Section 1 (6). (U. S. Code, Title 49, Sec. 1, Par. 6.)

"It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Section 2. (U. S. Code, Title 49, Sec. 2.)

"That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges,

demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3 (1) (U. S. Code, Title 49, Sec. 3, Par. (1)).

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic or any other carrier of whatever description."

Section 6 (1) (U. S. Code, Title 49, Sec. 6, Par. 1).

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the

separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."

Section 6 (4) (U. S. Code, Title 49, Sec. 6, Par. 4).

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

Section 6 (7) (U. S. Code, Title 49, Sec. 6, Par. 7).

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the

rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 13 (2) (U. S. Code, Title 49, Sec. 13, Par. 2).

"Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Represen-

tatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide."

Section 15 (13) (U. S. Code, Title 49, Sec. 15, Par. 13).

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Certificate of Service.

I hereby certify that I have this day served the aforesaid brief on behalf of rail appellants upon all parties of record in this case by mailing a copy thereof properly addressed to each other party of record.

John E. McCullough,
Of Counsel for Rail Appellants.

Dated at St. Louis, Missouri, this 11th day of March, 1943.